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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 ABSHER CONSTRUCTION  
11 COMPANY, et al.,

12 Plaintiffs,

13 v.

14 NORTH PACIFIC INSURANCE  
15 COMPANY, et al.,

Defendants.

CASE NO. C10-5821JLR

ORDER DENYING MOTION TO  
DISMISS BASED ON FEDERAL  
RULE OF CIVIL PROCEDURE 17  
AND TO SHOW CAUSE  
REGARDING SUBJECT  
MATTER JURISDICTION

16 **I. INTRODUCTION**

17 Before the court is Defendants North Pacific Insurance Company, OneBeacon  
18 Insurance Company, OneBeacon America Insurance Company, and Pennsylvania  
19 General Insurance Company's (collectively "OneBeacon") motion to dismiss the action  
20 based on Plaintiffs Absher Construction Company, and Pacific Components, Inc., d/b/a  
21 Absher Pacific Joint Venture's (collectively "Absher Pacific") failure to bring this action  
22 in the name of the real parties in interest under Federal Rule of Civil Procedure 17(a)(1).

1 (See Mot. (Dkt. # 22).) Defendant Assurance Company of America (“Assurance”) has  
2 joined in OneBeacon’s motion. (Joinder (Dkt. # 40).) Having reviewed the motion, all  
3 papers filed in support or opposition thereto, and the governing law, and being fully  
4 advised, the court DENIES OneBeacon’s and Assurance’s motion (Dkt. # 22).<sup>1</sup> Although  
5 the court concludes that Absher Pacific has failed to bring this action in the name of the  
6 real party in interest, the court concludes that Absher Pacific is entitled to a reasonable  
7 period of time in which to cure its status pursuant to Federal Rule Civil Procedure  
8 17(a)(3).

9 Prior to ordering this relief, however, the court finds that it must address a more  
10 fundamental issue raised by OneBeacon’s motion. Absher Pacific has asserted that the  
11 court’s subject matter jurisdiction rests on the diversity of citizenship of the parties  
12 pursuant to 28 U.S.C. § 1332. (Compl. (Dkt. # 1) ¶ 2.1.) As a result, the court’s  
13 conclusion that Absher Pacific has not brought this action in the name of the real party in  
14 interest raises an issue with respect to the court’s subject matter jurisdiction based on  
15 diversity of citizenship. Accordingly, as delineated below, Absher Pacific is directed to  
16 file a brief, no longer than ten pages, concerning this issue within ten calendar days of the  
17 date of this order. OneBeacon and Assurance may also file a brief concerning this issue,  
18 but are not required to do so. If the court is reassured concerning its subject matter  
19 jurisdiction, then it will order relief pursuant to Federal Rule of Civil Procedure 17(a)(3).

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22 <sup>1</sup> No party has asked for oral argument, and the court deems this motion to be appropriate  
for decision without it.

1 If the court is not so reassured, however, it will dismiss this matter for lack of federal  
2 subject matter jurisdiction.

## 3 **II. BACKGROUND**

4 The lawsuits underlying this declaratory judgment action arose out of construction  
5 defect claims involving the New Holly development in Seattle, Washington. (Compl. ¶¶  
6 3.1-3.5.) In 1997, the Seattle Housing Authority entered into construction contracts with  
7 Absher Pacific for construction of homes in the New Holly development. (*Id.* ¶ 3.1.) In  
8 performing the contract, Absher Pacific subcontracted with OneBeacon's and  
9 Assurance's insured, Plumbing Today, Inc. ("PTI") for installation of a plumbing and  
10 heating system known as a hydronic heating system. (*See id.* ¶¶ 3.2, 3.7-3.11.) Under  
11 the terms of the contract between PTI and Absher Pacific, PTI was required to obtain  
12 insurance for its work on the project and to name Absher Pacific as an "additional  
13 insured" under its insurance policies. (*Id.* ¶ 3.2.)

14 In 2008, the New Holly Homeowners Association brought an action for alleged  
15 defects in the hydronic heating system against the Seattle Housing Authority. (*Id.* ¶ 3.3.)  
16 The Seattle Housing Authority, in turn, filed a separate suit against its general contractor,  
17 Absher Pacific. (*See id.* ¶ 3.4.) Absher Pacific tendered defense of the suit to its own  
18 insurance carriers and to PTI's insurance carriers, including all of the defendants in the  
19 present lawsuit. (*See id.* ¶¶ 3.7-3.11.) According to the allegations in the complaint,  
20 OneBeacon denied Absher Pacific's tender of defense, and Assurance made no response.  
21 (*Id.* ¶¶ 3.11-3.12.)  
22

1 Discovery progressed in both lawsuits, but eventually a settlement, entitled the  
2 New Holly Final Settlement Agreement, was reached. (*See* Blackburn Decl. (Dkt. # 23)  
3 Ex. A (New Holly Final Settlement Agreement).) The settlement agreement included an  
4 assignment by Absher Pacific to certain insurance carriers, namely Arrowood Indemnity  
5 Company (“Arrowood”) and Housing Authority Risk Retention Group, Inc. (“HARRG”),  
6 of all claims that Absher Pacific could pursue against PTI’s insurance carriers. (*Id.* ¶  
7 2.12.) Arrowood insured Absher Pacific, and HARRG insured the Seattle Housing  
8 Authority. (Mot. at 3.) The assignment provision provides:

9 2.12 Absher Pacific [] assignment. [Absher Pacific] assign[s] to Arrowood  
10 and HARRG [its] claims (as limited by paragraph 2.10)<sup>2</sup> against PTI  
11 and Bio-Radiant and [its] claims against the insurers of PTI and Bio-  
Radiant. [Absher Pacific] will cooperate with Arrowood and HARRG  
in the prosecution of the assigned claims. . . .

12 (Blackburn Decl. Ex. A ¶ 2.12 (footnote added).) Both OneBeacon and Assurance  
13 are insurers of PTI. (Compl. ¶¶ 3.7-3.11.)

14 On November 9, 2010, Absher Pacific filed this suit seeking damages against  
15 Defendants, all of whom are PTI’s insurers. (*See* Compl.) OneBeacon has moved for  
16 dismissal under Federal Rule of Civil Procedure 17(a), which requires that “every action  
17 shall be prosecuted in the name of the real party in interest.” OneBeacon asserts that  
18 Absher Pacific is not the real party in interest by virtue of the assignment of its claims  
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21 <sup>2</sup> Paragraph 2.10 was a limitation of downstream claims (*see* Blackburn Decl. Ex. A ¶  
22 2.10), and neither party has asserted that this limitation has any bearing on the court’s resolution  
of this motion.

1 against PTI's insurers to Arrowood and HARRG. Assurance has joined in OneBeacon's  
2 motion.

### 3 III. ANALYSIS

#### 4 A. Standards

5 Federal Rule of Civil Procedure 17(a)(1) provides that "[a]n action shall be  
6 prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). A court  
7 determines whether a plaintiff is the real party in interest by examining the controlling  
8 substantive law. *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093-94 (9th Cir. 2004).  
9 Absher Pacific has alleged that this court has federal subject matter jurisdiction over this  
10 action based on diversity jurisdiction. (Compl. ¶ 2.1.) In determining the real party in  
11 interest under Rule 17(a), a court exercising diversity jurisdiction must apply substantive  
12 state law. *Allstate*, 358 F.3d at 1093-94. Accordingly, this court looks to Washington  
13 law to determine if Absher Pacific may proceed as a real party interest. *Id.* at 1094.

14 OneBeacon styled its motion under Rule 17(a)(1) as one for dismissal.<sup>3</sup> (*See* Mot.  
15 at 1.) A motion for dismissal under Federal Rule of Civil Procedure 12(b)(6) does not  
16 consider material outside the complaint. *Levine v. Diamanthuset*, 950 F.2d 1478, 1483  
17 (9th Cir. 1991). A party who submits material outside the pleadings is on notice that the  
18 court may use them to decide a motion originally filed as a motion to dismiss, requiring  
19 transformation to a motion for summary judgment. Fed. R. Civ. P. 12(d); *Olsen v. Idaho*

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21 <sup>3</sup> The federal rules do not specify a procedure for raising an objection that the plaintiff is  
22 not the real party in interest. A. Wright, A. Miller, M. Kane & R. Marcus, 6A Fed. Prac. & Proc.  
Civ. § 1554 (3d ed. 2011 Update).

1 *State Bd. Of Med.*, 363 F.3d 916, 922 (9th Cir. 2004) (“[A] represented party who  
2 submits matters outside the pleadings to the judge and invites consideration of them has  
3 notice that the judge may use them to decide a motion originally noted as a motion to  
4 dismiss, requiring its transformation to a motion for summary judgment.”) (internal  
5 quotations omitted).

6 Here, both parties have had the opportunity to submit materials pertinent to the  
7 motion, and both in fact have submitted materials outside of the complaint for the court to  
8 consider in ruling upon OneBeacon’s motion. (*See* Blackburn Decl. (submitted by  
9 OneBeacon); Supp. Blackburn Decl. (Dkt. # 55) (submitted by BeaconOne); Love Decl.  
10 (Dkt. # 45) (submitted by Absher Pacific); Tanabe Decl. (Dkt. # 46) (submitted by  
11 Absher Pacific).) Accordingly, the court finds the parties to be on notice that the court  
12 considers this motion as one for summary judgment. *See, e.g., Brunner v. Bawcom*, No.  
13 CV 10-24-M-DWM, 2010 WL 3724436, at \*9 (D. Mont. Sept. 15, 2010).

14 Summary judgment is appropriate if the evidence, when viewed in the light most  
15 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to  
16 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.  
17 P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of L.A.*,  
18 477 F.3d 652, 658 (9th Cir. 2007). A party is entitled to summary judgment if the

evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).<sup>4</sup>

### **B. Real Party in Interest**

Absher Pacific asserts that under Washington law an insured party bringing an action remains the real party in interest, even if its carrier has previously paid its loss. (Resp. (Dkt. # 44) at 4-5.) Absher Pacific bases its argument on cases dealing with the subrogation of an insured's claim after an insurer has paid its loss or with loan and trust agreements between a carrier and its insured entitling the insurer to recover proceeds the insured recovers in an action for damages concerning the insured's loss. (*See id.* at 4-7.) For example, in *McRory v. Northern Insurance Company of New York*, 980 P.2d 736 (Wash. 1999), the insured brought an action in its own name to recover attorneys' fees from one of its insurers, Northern Insurance, after receiving payment for its defense from another insurer, Wausau. Wausau had both subrogation rights and rights under a loan and trust agreement for the proceeds that the insured obtained in the action. *Id.* at 739-40. The Washington Supreme Court held that neither the insurer's subrogation rights, nor the insured's agreement to reimburse its insurer for payments made by the insurer in

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<sup>4</sup> In addition, as noted below, OneBeacon's motion raises issues concerning this court's subject matter jurisdiction. Because the court's subject matter jurisdiction may rest on the resolution of whether Absher Pacific or Arrowood and HARRG are the real parties in interest, OneBeacon's motion also could be considered as a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss. *See Malikyar v. Sramek*, No. C 07-03533 WHA, 2008 WL 4891020, at \* 3 (N.D. Cal. Nov. 12, 2008) (citing *Allstate*, 358 F.3d at 1093-94). "[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

1 the event the insured successfully sued a liable third party, had any effect on the insured's  
2 status as the real party in interest. *Id.*<sup>5</sup>

3 Here, however, OneBeacon and Assurance assert that Absher Pacific is not the  
4 real party in interest by virtue of the contractual assignment of its claims contained within  
5 the New Holly Final Settlement Agreement, and not as a result of the subrogation of its  
6 claims or a loan and trust agreement with its insurer. Indeed, as OneBeacon points out,  
7 HARRG was never an insurer of Absher Pacific. Accordingly, there is no evidence that  
8 Absher Pacific's claims against PTI's carriers were ever subrogated with respect to  
9 HARRG, nor is there any evidence that Absher Pacific and HARRG entered into any  
10 trust and loan agreement with respect to any proceeds Absher Pacific should recover in  
11 an action concerning its loss. HARRG's right to pursue Absher Pacific's claims against  
12 PTI's carriers arises solely from Absher Pacific's assignment of its claims to HARRG,  
13 and not as result of HARRG's status as an insurance carrier. Accordingly, the foregoing  
14 authority relied upon by Absher Pacific is inapplicable – at least with regard to Absher  
15 Pacific's assignment of its claims to HARRG – because HARRG was never an insurer of  
16 Absher Pacific.

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19 <sup>5</sup> See also *Webber v. Biddle*, 431 P.2d 705, 710 (Wash. 1967) (stating that nothing in the  
20 execution of a loan and trust agreement alters the fact that the insured is the real party in interest  
21 with respect to a claim against the tortfeasor); *Fraser v. Beutel*, 785 P.2d 470, 477 (Wash. Ct.  
22 App. 1990) (“Washington courts have rejected the argument that an insurer who has paid its  
insured and been subrogated to the insured's rights against the wrongdoer is the real party in  
interest and the only one entitled to prosecute a subsequent action against the wrongdoer.”);  
*Allstate*, 358 F.2d at 1094 (holding that, under Washington law, the insured was the real party in  
interest in an action against the tortfeasor despite the subrogation rights of the insurer).



1 Under Washington law, an assignee prosecutes an assigned cause of action under  
2 its own name as the real party in interest. *See* RCW 4.08.080 (stating that “[a]ny  
3 assignee or assignees . . . may, by virtue of such assignment, sue and maintain an action  
4 or actions in his or her name . . . .”); *McDaniel v. Pressler*, 29 P. 209, 210 (Wash. 1892)  
5 (holding that where promissory notes have been assigned for the purpose of bringing a  
6 suit, the assignee is the real party in interest in an action to enforce the collection of the  
7 notes); *see also Stover v. Winston Bros. Co.*, 55 P.2d 821, 826 (Wash. 1936) (“An  
8 assignment of a chose in action vests the title in the assignee, who may sue thereon in his  
9 own name.”); *Walter Implement, Inc. v. Focht*, 709 P.2d 1215, 1218 (Wash. Ct. App.  
10 1985), *rev’d on other grounds*, 730 P.2d 1340 (Wash. 1987); *Dep’t of Labor & Indus. v.*  
11 *Wendt*, 735 P.2d 1334, 1337 (Wash. Ct. App. 1987) (“As assignee of the claim, the  
12 Department was the real party in interest and entitled to bring the action in its own name  
13 under CR 17(a).”), *overruled on other grounds by State v. WWJ Corp.*, 980 P.2d 1257  
14 (1999). Under this authority, HARRG, and not Absher Pacific, would appear to be the  
15 real party in interest with respect to the claims in this lawsuit that Absher Pacific  
16 previously assigned to HARRG in the New Holly Final Settlement Agreement.

17 Of course, this does not resolve the real party in interest issue with respect to  
18 Arrowood, which was an insurer of Absher Pacific. The court, however, is not convinced  
19 that the case law cited by Absher Pacific concerning real party in interest issues in the  
20 context of subrogation and loan and trust agreements between insureds and insurers is  
21 applicable in the context of a full assignment of a claim by an insured to its carrier.  
22 Indeed, the *McRory* desision, relied upon by Absher Pacific, appeared to acknowledge

1 the distinction between subrogation and an assignment of an insured's rights when it  
2 stated:

3 [I]n *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wash.2d 490,  
4 507-08, 844 P.2d 403 (1993), we held assignees of the insured may recover  
5 fees if they are compelled to sue an insurer to secure coverage. Plainly, if  
McRory had assigned its rights [to the recovery of its legal fees] to Wausau,  
Wausau would have been entitled to recover fees.

6 *McRory*, 980 P.2d at 739. Despite the *McRory* court's ruling that the insured was the real  
7 party in interest in the context of either the subrogation of its claim to its carrier or a loan  
8 and trust agreement with its carrier, the foregoing language implies that the carrier would  
9 be entitled to bring a claim if the insured had assigned its rights.

10 Although HARRG and Arrowood may have subrogation rights against PTI's  
11 carriers, the court must also consider the impact of Absher Pacific's assignment of its  
12 claims to HARRG and Arrowood in its real party in interest analysis. There is a real, if  
13 subtle, distinction between subrogation and assignment. One leading authority has  
14 described the distinction as follows:

15 . . . [S]ubrogation presupposes actual payment and satisfaction of a debt or  
16 claim to which the payor is subrogated, whereas under an assignment of a  
17 right or claim, the whole right or claim is assigned. In essence, while  
subrogation is a designation of proceeds recovered from a wrongdoer, an  
assignment transfers the entire cause of action to the insurer.

18 16 Couch on Insurance § 222:53 (3rd ed. Updated Nov. 2011). Thus, Washington case  
19 law analyzing real party in interest issues in the context of subrogation is distinguishable  
20 from the context here, which involves an insured's assignment of its claims against non-  
21 paying carriers to its settling carrier, namely Arrowood.

1 At least one Washington court has dismissed a claim brought by an insured against  
2 an insurer because the insured had previously assigned its claim to a third party. *See*  
3 *Bench v. State Auto. & Cas. Underwriters, Inc.*, 408 P.2d 899, 900 (Wash. 1965); *see*  
4 *also Mun v. First Fin. Ins. Co.*, No. C05-2098RSL, 2006 WL 3761361, at \*2 (W.D.  
5 Wash. Dec. 20, 2006) (insured who assigned rights against non-settling insurer to its  
6 carrier was not the real party in interest under Washington law). Further, the Washington  
7 Supreme Court has recently stated:

8 While we need not decide whether conventional [or contractual as opposed  
9 to equitable] subrogation and assignment are equivalent in all respects, this  
10 court recognizes that an insurer who receives full contractual assignment of  
an insured's rights may bring a conventional subrogation claim to enforce  
those rights.

11 *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 191 P.3d 866, 874 (Wash. 2008); *see also*  
12 *Nat'l Union Fire Ins. Co. v. Greenwich Ins. Co.*, No. C07-2065-JCC, 2009 WL 272895,  
13 at \*4, n. 3 (W.D. Wash. Feb. 2, 2009) (“[Injured party] assigned to [its paying carrier] all  
14 of its claims against [the non-paying carrier] relating to or arising out of the [underlying]  
15 litigation[, and] [t]hus [the paying carrier] can assert [the injured party's] rights in [a  
16 subsequent] lawsuit for breach of contract, bad faith, and violation of the Washington  
17 Consumer Protection Act.”). Based on these authorities, the court concludes that under  
18 Washington law where an insured has fully assigned its claims against a non-paying  
19 carrier to its paying carrier, the carrier or other entity who received the assignment – and  
20 not the insured – is the real party in interest when suit is brought on the assigned claim.  
21 Accordingly, the court agrees with OneBeacon that Absher Pacific is not the real party in  
22 interest in this lawsuit. The real parties in interest, based on Absher Pacific's assignment

1 of its claims against PTI's carriers in the New Holly Final Settlement Agreement, are  
2 HARRG and Arrowood.

### 3 **C. Ratification, Joinder, or Substitution**

4 Although Rule 17(a)(1) requires that "[a]n action must be prosecuted in the name  
5 of the real party in interest," Fed. R. Civ. P. 17(a)(1), the Federal Rules have incorporated  
6 an escape clause that allows a plaintiff to avoid dismissal, *see* Fed. R. Civ. P. 17(a)(3).  
7 Rule 17(a)(3) states that "[t]he court may not dismiss an action for failure to prosecute in  
8 the name of the real party in interest until, after an objection, a reasonable time has been  
9 allowed for the real party in interest to ratify, join, or be substituted into the action." *Id.*

10 Despite the broad wording of Rule 17(a)(3), the Advisory Committee Notes  
11 associated with the Rule state that the escape clause is "intended to prevent forfeiture  
12 when determination of the proper party to sue is difficult or when an understandable  
13 mistake has been made." Fed. R. Civ. P. 17, Advisory Committee Notes 1966. In sync  
14 with this limitation, the Ninth Circuit has applied Rule 17(a)(3) to those cases involving  
15 an understandable mistake. *See, e.g., Dunmore v. United States*, 358 F.3d 1107, 1112  
16 (9th Cir. 2004) (stating that ratification under Rule 17(a) is permitted so long as the  
17 plaintiff's decision to sue in his own name represented "an understandable mistake and  
18 not a strategic decision"); *Goodman v. United States*, 298 F.3d 1048, 1053 (9th Cir.  
19 2002) ("[The last sentence] in Rule 17(a) is designed to avoid forfeiture and injustice  
20 when an understandable mistake has been made in selecting the party in whose name the  
21 action should be brought.") (internal quotations omitted); *United States for Use & Benefit*  
22 *of Wulff v. CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989) (stating that "[t]he purpose of

1 this portion of Rule 17(a) is to prevent forfeiture of an action when determination of the  
2 right party to sue is difficult or when an understandable mistake has been made”); *see*  
3 *also In re Phenylpropanolamine Products Liability Litig.*, MDL No. 1407, 2006 WL  
4 2136722, at \* 3 (W.D. Wash. July 28, 2006) (“The plain language of [Rule 17(a)] is  
5 broad, but courts have imputed some limitation on its application. In particular, a  
6 plaintiff must show that his decision to sue in his own name was an understandable  
7 mistake.”) (citing *Dunmore*, 358 F.3d at 1112) (internal quotation marks omitted).

8 OneBeacon asserts that Absher Pacific is not entitled to the protections of Rule  
9 17(a)(3) because “there are no facts demonstrating that Arrowood and HARRG were  
10 unknown or that identifying them would be difficult.” (Mot. at 6.)<sup>6</sup> Relying upon  
11 *Goodman v. United States*, 298 F.3d 1048 (9th Cir. 2002), Absher Pacific argues that an  
12 “understandable mistake” can include a reasonable uncertainty about the law. (Resp. at  
13 8-9.) In *Goodman*, the court found that counsel “made an understandable pleading error”  
14 by filing the original complaint on behalf of the decedent’s estate rather than the  
15 decedent’s husband because “there may have been uncertainty about the correct plaintiff  
16 [due to] uncertainty about applicable law.” 298 F.3d at 1054. The Ninth Circuit went on  
17 to state that “[t]o hold that [plaintiff], in his individual capacity, is time barred would go

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19 <sup>6</sup> In *Dunmore*, the Ninth Circuit held that ratification under Rule 17(a) was permitted so  
20 long as the plaintiff’s decision to sue in his own name represented “an understandable mistake  
21 and not a strategic decision.” 358 F.3d at 1112. OneBeacon also attempts to assert that Absher  
22 Pacific’s decision to bring this action in its own name rather than that of HARRG and Arrowood  
was somehow strategic in nature. (*See* Reply (Dkt. # 54) at 8-9.) In light of the fact, however,  
that this case will be tried to the court and not to a jury, the court finds these arguments to be  
unconvincing.

1 against the purpose of the last sentence of Rule 17(a), that is, to prevent forfeiture of a  
2 claim when an honest mistake was made.” *Id.*

3 Absher Pacific asserts that Washington law is complex concerning under what  
4 circumstances an insured or an insurer is the real party in interest with regard to a claim.  
5 (Resp. 8-9.) Thus, if it erred with respect to the real party in interest in this lawsuit, its  
6 mistake was understandable, and it is entitled to the protections of Rule 17(a)(3) to avoid  
7 dismissal of its lawsuit. (*See id.*) The court is inclined to agree. Indeed, one respected  
8 Washington commentator has stated that “the Washington view” concerning whether the  
9 insured or the insurer is the real party in interest “with reference to subrogation is not  
10 entirely clear.” K. Teglund, 3A Wash. Practice, Rules Practice CR 17 (5th ed. 2011)  
11 (Author’s Comment No. 9). Nevertheless, before the court can enter an order permitting  
12 a reasonable period of time for Arrowood and HARRG “to ratify, join, or be substituted  
13 into the action,” *see* Fed. R. Civ. P. 17(a)(3),<sup>7</sup> it must first resolve a more fundamental  
14 issue raised by OneBeacon’s motion, as discussed below.

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18 <sup>7</sup> OneBeacon spends a considerable amount of its briefing arguing that simple ratification  
19 of this lawsuit by HARRG and Arrowood would be inadequate, and that substitution or joinder  
20 of these parties is necessary to avoid any possible prejudice to Defendants. (Reply at 7-10.)  
21 Rule 17(a)(3), however, makes no distinction between these three remedies. *See* Fed. R. Civ. P.  
22 17(a)(3). Proper ratification under Rule 17(a)(3) simply requires that the ratifying party  
authorize the continuation of the lawsuit and agree to be bound by the result. *Mutuelles Unies v.*  
*Kroll & Linstrom*, 957 F.2d 707, 712 (9th Cir. 1992). So long as these elements are present, the  
court is unconvinced that ratification by HARRG and Arrowood would be an inadequate remedy  
here.

#### D. Federal Subject Matter Jurisdiction

The court's ruling above that HARRG and Arrowood are the real parties in interest to this lawsuit raises an issue concerning the court's subject matter jurisdiction. Although none of the parties raised this issue or discussed it in their briefing, the court has an independent and continuing obligation to address *sua sponte* whether it has subject matter jurisdiction. *Allstate*, 358 F.3d at 1093. In its complaint, Absher Pacific alleges federal subject matter jurisdiction is proper based on 28 U.S.C. § 1332, diversity of citizenship. (*See* Compl. ¶ 2.1.) Absher Pacific's allegations concerning diversity are based on its alleged status as plaintiff in this lawsuit. The court, however, has found that HARRG and Arrowood are the real parties in interest here, and pursuant to Rule 17(a)(1), must be named as plaintiffs. Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest."). In *Allstate*, the Ninth Circuit found that its ruling – that the insured was the real party in interest (and not the subrogated insurer who was originally named as plaintiff) – destroyed complete diversity of citizenship between the parties to the lawsuit rendering the court devoid of subject matter jurisdiction.<sup>8</sup> 358 F.3d at 1095. Accordingly, this court also must examine the diversity of citizenship between

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<sup>8</sup> Although the Ninth Circuit's ruling in *Allstate* concerning the interplay between real party in interest issues and subject matter jurisdiction based on diversity of citizenship is germane to this court's ruling, the ruling by the *Allstate* court in that the insured, and not the insurer, was the real party in interest is distinguishable from the facts present here. In *Allstate*, the court was proceeding under an analysis of Washington law based on subrogation. *See Allstate*, 358 F.3d at 1091-92. As discussed above, subrogation and assignment are distinct concepts, and are treated differently under Washington law with regard to real party in interest issues.

1 the parties to this lawsuit following its ruling that HARRG and Arrowood, and not  
2 Absher Pacific, are the real parties in interest.

3       There are no facts in the record from which the court can discern the citizenship of  
4 HARRG and Arrowood. The court, therefore, is uncertain whether complete diversity of  
5 citizenship exists among the parties. Accordingly, within 14 calendar days of the date of  
6 this order, Absher Pacific shall file a brief no longer than ten pages which provides the  
7 court with (1) sufficient information concerning the citizenship of HARRG and  
8 Arrowood to establish that complete diversity of citizenship continues to exist with  
9 respect to the parties in this action, or (2) some other legitimate basis for the court's  
10 continuing exercise of subject matter jurisdiction over this lawsuit. OneBeacon and  
11 Assurance may, but are not required, to file a brief (no longer than ten pages) addressing  
12 the same issues within the same time frame.<sup>9</sup>

13       If, based on the parties' briefing, the court is reassured that it has subject matter  
14 jurisdiction, it will promptly enter an order pursuant to Rule 17(a)(3) permitting a  
15 reasonable time for HARRG and Arrowood to ratify, join, or be substituted into this  
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19       <sup>9</sup> Absher Pacific bears the burden of demonstrating that subject matter jurisdiction exists  
20 over the complaint. *See Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th  
21 Cir. 2001). "A plaintiff suing in a federal court must show in his pleading, affirmatively and  
22 distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so,  
the court, on having the defect called to its attention or on discovering the same, must dismiss the  
case, unless the defect be corrected by amendment." *Id.* (quoting *Smith v. McCullough*, 270 U.S.  
456, 459 (1926)).

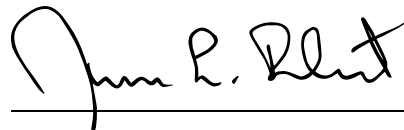


lawsuit. If the court is not so reassured, then it will enter an order dismissing this action for lack of subject matter jurisdiction. *See Allstate*, 358 F.3d at 1095.<sup>10</sup>

#### IV. CONCLUSION

Based on the foregoing, the court DENIES One Beacon's motion to dismiss based on Federal Rule of Civil Procedure 17(a)(1) (Dkt. # 22). As stated above, the court further ORDERS Absher Pacific to file within 14 calendar days of the date of this order a memorandum (no longer than ten pages) concerning the diversity of citizenship among the parties to this lawsuit and the court's subject matter jurisdiction, in light of the court's ruling that HARRG and Arrowood are the real parties in interest under Rule 17(a)(1). OneBeacon and Assurance may, but are not required, to file a 10-page memorandum concerning the same issue within the same time frame.

Dated this 3rd day of January, 2012.



JAMES L. ROBART  
United States District Judge

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<sup>10</sup> The court will defer ruling on Absher Pacific's motion for partial summary judgment with respect to the Defendants' duty to defend (Dkt. # 24) until after the court receives the parties' briefs concerning the court's subject matter jurisdiction and resolves that issue.